

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
APPELLATE DIVISION
CRIMINAL APPEAL NO. E018 OF 2025

SADAM BIGE.....
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE CONVICTION AND
SENTENCE BY HON CHRISTINE WEKESA (SPM)
DELIVERED IN MARSABIT SPMCR NO E170 OF
2024 DATED 15th MAY 2025

BETWEEN

REPUBLIC.....

PROSECUTOR

VERSUS

SADAM BIGE.....
ACCUSED

JUDGEMENT

A. INTRODUCTION

1. The Appellant was charged with the offence of **breaking into a building, with intent to commit a felony contrary to Section 307 of the Penal Code**. The particulars were that on the 12th December 2024 at old town Village in Marsabit Central sub- county within Marsabit County, he broke and entered into an office building belonging to Biashara Centre with intent to commit a felony namely stealing therefrom
2. During trial, the prosecution called five witnesses who testified in support of their case. **PW1 Oche Bulge** recalled that he was called and informed by the CEC for trade, Mr Aden Jillo that there had been a break-in incident and attempted theft at their office situated at Biashara Centre, where a person had gained access by cutting the iron sheets to access the building and had been arrested therein. He had proceeded to the said building and indeed confirmed that what he had been told was true. He did not know the Appellant, but he was the person caught red handed by the watchman in the act of attempting to steal from them.
3. **PW2 Godana Jattani** testified and stated that he was employed as a watchman at Biashara Center,

and on the material, afternoon had heard some noise emanating from the building thus decided to go check, on what was happening. He went around the building and saw destruction on the iron sheet wall and when he moved closer, he saw the Appellant, who instantly attacked him with a knife with the intention to harm him. A struggle ensued and he concurrently shouted for help, which attracted neighbour's who came to his rescue and assisted him to subdue the Appellant. He confirmed that the person he saw and arrested was the Appellant and he had destroyed the iron sheet wall with the aim of stealing therein.

4. **PW3 Ezekiel Mogaka** confirmed that on the material day at around 4.20pm, he was at his house, which was near Biashara centre, when he heard a gunshot and saw PW2 calling for help, while engaged in a tussle with a third party. He rushed to assist him and PW2 told him that he had arrested the Appellant, for breaking into their office, a fact which he confirmed as he saw the iron sheet wall, where the Appellant had cut through to gain access into the said building. Under cross examination he reaffirmed his evidence in chief and confirmed that it was the

Appellant who was arrested, red handed on the material day.

5. **PW4 PC Raymond Kiplangat Chelule**, testified that he was assigned to investigate this case by the OCS, and after booking it in the OB, had proceeded to the crime scene, where he took pictures of the cut iron sheets, and had also found a knife at the said crime scene all of which he produced into evidence. After recording statements from relevant witnesses, he had charged the Appellant with the offence before court.
6. The Appellant was placed on his defence and offered to give sworn evidence. He stated that he PW1 to PW3 gave contradictory evidence and were not sure of his identity nor was the knife produced sharp enough to cut through the Iron sheets as alleged. He denied committing the said offence and was an innocent passerby walking past the incident scene, when PW2 meet him and asked him if he had seen a person ran away, but he told him he had not seen anybody. Under cross examination he denied being found inside, Biasahara centre and insisted that he had not been arrested therein by PW2.
7. The trial court considered the evidence adduced and found the Appellant guilty of the offence he was

charged with. After mitigation and upon considering the pre-sentence report he was sentenced to serve a five-years imprisonment.

8. The Appellant, being dissatisfied with the conviction and sentence passed, filed his petition of Appeal dated 21.05.2025, and raised the following grounds of Appeal;

- a. ***That, the learned Trial Magistrate erred in matters of law and fact by failing to take into account the appellant's defence.***
- b. ***That, the learned trial Magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.***
- c. ***That, the learned trial magistrate erred in law and fact in failing to independently analyze and/or evaluate the evidence on record hence reached an erroneous determination.***
- d. ***That the learned trial Magistrate erred in failing to appreciate and find that all the charges preferred against the appellant had not been established and proved as required by law.***
- e. ***That the learned trial Magistrate erred in law and fact in imposing a very harsh and excessive sentence without considering the Appellants mitigation and circumstances of the case.***

15. The Appellant thus prayed that his Appeal be allowed, the conviction and sentence be set aside and he be set free

C. THE APPEAL

16. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion, while taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence, and/or seeing their demeanor. On this issue, this court is guided by the Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] e KLR** where, they restated the duty of the first Appellate court as follows:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due

allowance for this.” See also the case of **Kagori Kaboi v Republic [2020] Eklr.**

9. Having considered the lower court record, the grounds of appeal, and the submissions of both parties, I do find the following as issues for determination;

a. Whether the prosecution proved their case beyond reasonable doubt, that indeed it was Appellant who had broken into “Biashara centre” and attempted to steal therefrom?

b. Whether the sentence passed was harsh and excessive.

10. The Appellant was charged with the offence of breaking into a building with intent to commit a felony contrary to provisions of **section 307 of the penal code**. The said section provides that;

“ Any person who breaks and enters a schoolhouse, shop, warehouse, store, office, counting house, garage, pavilion, club, factory or workshop, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling house and

occupies with it but is not part of it, or any building used as a place of worship, with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years.”

11. **Section 303 of the Penal Code** defines breaking and entering as follows

Section 303 (1)

(1) A person who breaks any part, Whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other things intended to close or cover an opening in a building or an opening giving passage from one part of a building to another, is deemed to break the building.

(2) A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

(3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by

collusion with any person in the building, or who enters any aperture of the building left open for any purpose but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.

12. The Appellant was caught red handed in broad day light by PW2 after he had cut through the iron-sheet wall of “Biashara centre” and entered therein with the intention to steal computers. PW2 raised alarm and was assisted by PW3 and other members of the public to apprehend the Appellant. The evidence lead did prove the particulars of the charge and I do find that his conviction is safe and sound.
13. As regards the sentence, This Court is guided by the principles laid out in the Court of Appeal case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR** where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere

with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

20. The trial Magistrate did consider the Appellant's mitigation, called and considered the pre-sentence report before proceeded to sentenced the Appellant to serve a term of five (5) years imprisonment as provided for under the Penal Code. The Appellant is not a first offender and it has not been shown that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle in arriving at the said sentence. Therefore, the

Appellants Appeal against sentence fails save for the fact that the same shall run from 12th December 2024, when he was arrested.

(C) DISPOSITION

22. The upshot, having considered the entire record of Appeal and submissions made, I do find that the Appeal as against conviction fails and is hereby dismissed.
23. The Appellants sentence is also upheld save that based on provisions of **Section 333(2) of the Criminal Procedure Code**, the said sentence will start running from 12th December 2024, when he was arrested.
24. Right of Appeal 14 days
25. It is so ordered.

Judgment written, dated and signed at Marsabit this 17th day of DECEMBER 2025.

FRANCIS RAYOLA OLEL
JUDGE

**Delivered on the virtual platform, Teams this
17th day of DECEMBER 2025.**

In the presence of;

Present in court Appellant

Mr. Otieno For O.D.P.P

Mr. Otieno..... Court Assistant

ORIGINAL